

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FREQUENCY, LLC (f/k/a GOODRADIO.TX, LLC), INC.

Plaintiff,

v.

CLEAR CHANNEL BROADCASTING, INC.,

Defendant.

No. 07-CIV-7785

Hon. P. Kevin Castel

**NOTICE OF MOTION
TO DISMISS, OR IN THE
ALTERNATIVE, STAY**

PLEASE TAKE NOTICE THAT, upon the accompanying Memorandum of Law in Support of Defendant's Motion to Dismiss or in the Alternative, Stay, the accompanying Declarations of Dirk G. Eller, Andrew W. Levin and Melanie G. Cowart in Support of Defendant's Motion to Dismiss or in the Alternative, Stay, and upon all other pleadings and proceedings had in this matter, Defendant Clear Channel Broadcasting, Inc., by and through its undersigned counsel, will move this Court before the Honorable P. Kevin Castel, United States District Judge, 500 Pearl Street, New York, New York, at such date and time as the Court shall determine, for an Order granting the Motion to Dismiss or in the Alternative, Stay, and any further relief the Court may deem just and proper.

Dated: October 2, 2007
New York, New York

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

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COUNSEL FOR DEFENDANT
CLEAR CHANNEL BROADCASTING, INC.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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Plaintiff,

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Defendant..

No. 07-CIV-7785 (PKC)

**DEFENDANT'S MOTION TO
DISMISS OR IN THE
ALTERNATIVE, STAY**

DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE, STAY

Defendant Clear Channel Broadcasting, Inc. ("Clear Channel") requests that the Court dismiss, or in the alternative, stay this matter. A competing lawsuit, entitled *Clear Channel Broadcasting, Inc., et al. v. Frequency, LLC, et al.*, Case No. 2007-CI-12493, was filed by Clear Channel in the 288th District Court, Bexar County, Texas (the "Texas Lawsuit") three (3) days prior to the date on which this case was filed. Plaintiff Frequency, LLC consented to venue and personal jurisdiction in Bexar County, Texas, and the *Colorado River* and *Guilini* abstention factors weigh against retention of this lawsuit in New York. Moreover, all of the parties necessary for a complete and just adjudication are before the Texas court. All of the parties are not before this Court, and there is no evidence that Frequency will be prejudiced by bringing its claims in the Texas case. Therefore, the interests of justice will be best served by dismissing, or in the alternative staying, this lawsuit to allow the parties to adjudicate this dispute in the forum of the first-filed Texas case, thus avoiding duplicative, piecemeal and potentially inconsistent litigation.

This motion is and will be based on the accompanying Memorandum of Law in Support and the Declarations of Dirk G. Eller , Melanie G. Cowart and Andrew W. Levin.

Dated: October 2, 2007
New York, New York

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

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CLEAR CHANNEL BROADCASTING, INC.

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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Plaintiff,

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Defendant..

No. 07-CIV-7785 (PKC)

**DECLARATION OF ANDREW
W. LEVIN IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS OR STAY**

**DECLARATION OF ANDREW W. LEVIN IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE, STAY**

I, Andrew W. Levin, declare and state as follows:

1. My name is Andrew W. Levin. I am over the age of 21. I have never been convicted of a felony, and I have personal knowledge of the facts contained herein, which are true and correct.

2. I am Executive Vice President and Chief Legal Officer for Clear Channel Communications, Inc.

3. On Friday, August 17, 2007, Clear Channel Broadcasting, Inc. and others filed the following lawsuit in San Antonio, Bexar County, Texas for breach of contract, fraud and tortious interference concerning the parties' April 30, 2007 Asset Purchase Agreement ("APA"): *Clear Channel Broadcasting, Inc., et al. v. Frequency, LLC, et al.*, Case No. 2007-CI-12493, 288th District Court, Bexar County, Texas ("Texas Lawsuit").

4. I sent a copy of the petition in the Texas Lawsuit by email to Glenn Kaufman, Paul Kasper, Eric Schondorf, Frequency, LLC and American Securities Capital Partners, LLC on August 17, 2007.

5. On Monday, August 20, 2007, after receiving notice of the Texas Lawsuit, Frequency, LLC filed the following action in New York: *Frequency, LLC v. Clear Channel Broadcasting, Inc.*, Case No. 602808-07, in the Supreme Court of the State of New York, New York County ("New York Lawsuit"). The New York Lawsuit, which was filed after the Texas Lawsuit, alleges competing claims for breach of contract and declaratory relief in connection with the APA.

6. I swear under penalty of perjury that the foregoing is true and correct.

Executed in San Antonio, Texas on this 10th day of September 2007.


ANDREW W. LEVIN

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FREQUENCY, LLC (f/k/a GOODRADIO.TX, LLC), INC.

Plaintiff,

v.

CLEAR CHANNEL BROADCASTING, INC.,

Defendant..

No. 07-CIV-7785 (PKC)

**DECLARATION OF DIRK G.
ELLER IN SUPPORT OF
DEFENDANT'S MOTION TO
DISMISS OR STAY**

**DECLARATION OF DIRK G. ELLER IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE, STAY**

I, Dirk G. Eller, declare and state as follows:

1. My name is Dirk G. Eller. I am over the age of 21. I have never been convicted of a felony, and I have personal knowledge of the facts contained herein, which are true and correct.
2. I am Vice President, Corporate Development for Clear Channel Communications, Inc. My duties and responsibilities include managing the acquisition, divestiture and capital investment process for the company. As a part of my duties and responsibilities, I participated in the negotiation, drafting and execution of the Asset Purchase Agreement ("APA") with Frequency, LLC (f/k/a GoodRadio.TV, LLC).
3. In January 2006, Clear Channel Communications, Inc. established an auction to sell radio stations in 91 markets. The radio stations and the licenses to operate the stations are owned and operated by Defendant Clear Channel Broadcasting, Inc. ("Clear Channel") and eight other entities - Clear Channel Broadcasting Licenses, Inc., CC Licenses, LLC, Capstar Radio

Operating Company, Capstar TX Limited Partnership, AMFM Radio Licenses, LLC, Citicasters Co., Citicasters Licenses, L.P., and Jacor Broadcasting Corporation (collectively with Clear Channel, the "Owners").

4. Dozens of bidders responded to the auction, including Frequency. On April 30, 2007, Frequency entered into the APA with the Owners to buy 187 radio stations in 36 of the 88 markets for \$452.1 million. Drafts of the APA were prepared by Clear Channel's outside counsel and circulated to Clear Channel employees at the company's corporate headquarters in San Antonio, Texas for review and comment. Multiple drafts of the APA were received and reviewed by Clear Channel representatives in San Antonio. The APA was signed by John T. Tippit, Clear Channel Senior Vice President – Strategic Development, on behalf of the Owners from his office in San Antonio.

5. After reaching the agreement to sell Frequency the 187 stations, Clear Channel Communications, Inc. withdrew those stations from the auction and from potential sale.

6. On May 11, 2007, Frequency assigned its rights under the APA to another Delaware limited liability company called Frequency License, LLC ("Frequency License").

7. American Securities Capital Partners, LLC ("ASCP") is funding the purchase of the radio stations from Clear Channel, and officers and directors of ASCP are also officers of Frequency and Frequency License.

8. Prior to signing the APA, Frequency and ASCP, as a part of the due diligence process, were given full access to all business and financial information regarding the stations to be purchased, including but not limited to access to an online virtual data room. The materials contained in the online virtual data room were generated and maintained by Clear Channel employees in San Antonio. I participated in directing and compiling information for

the data room. I also participated in numerous telephone calls and email communications with representatives from and consultants for Frequency and ASCP. Crowe and Chizek, a CPA firm hired by Frequency, made a trip to San Antonio to review documents and meet with Kelly Creager, Broadcast Controller/Director – Budgeting and Forecasting for Clear Channel. Ms. Creager's office is located at Clear Channel in San Antonio.

9. The phone calls and email communications that I had with Frequency and ASCP occurred while I was in my office at Clear Channel's corporate headquarters, 200 E. Basse Road, San Antonio, Texas. Other Clear Channel employees located in San Antonio, Texas who communicated with representatives of Frequency and ASCP included Jerry Kersting, Kelly Creager, Jennifer Zimmerman, Susan Hicks, Rick Mangum, Steve Brunner, Kathy Gottardy, Reese Wilson, Stephanie Tudyk and Luke Allen.

10. After the APA was executed, Clear Channel continued to provide information about the stations to Frequency and ASCP, including weekly and monthly financial reports, in accordance with the terms of the APA.

11. On July 19, 2007, Clear Channel's CEO, Mark Mays, advised me and others that he had received a phone call from Jeffrey Warshaw, a consultant hired by Frequency/ASCP. Mr. Warshaw is the CEO of Connoisseur Media, Inc., a Clear Channel competitor. During the phone call, Mr. Mays reported that Mr. Warshaw told him that Frequency and ASCP were not going to pay Clear Channel the agreed upon purchase price for the radio stations. Mr. Mays stated that he told Mr. Warshaw that Clear Channel expected Frequency and ASCP to abide by the terms of the APA.

12. Five days after the teleconference, Frequency wrote Clear Channel and accused it of breaching and being in default of the APA. Clear Channel responded with correspondence

denying Frequency's allegations and asking Frequency for assurance that it intended to consummate the deal as agreed under the APA, including paying the agreed upon purchase price. Frequency and ASCP have not given Clear Channel the requested assurance.

13. I swear under penalty of perjury that the foregoing is true and correct.

Executed in San Antonio, Texas on this 10TH day of September 2007.



DIRK G. ELLER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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Plaintiff,

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Defendant.

No. 07-CIV-7785 (PKC)

**DECLARATION OF MELANIE G. COWART IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE, STAY**

I, Melanie G. Cowart, declare and state as follows:

1. My name is Melanie G. Cowart, I am over the age of 21. I have never been arrested for or convicted of any crime, and I have personal knowledge of the facts contained herein, which are true and correct.

2. I am licensed to practice law in the state of Texas, and I am a senior counsel with the law firm of Akin Gump Strauss Hauer & Feld, LLP ("Akin Gump"). Akin Gump represents Defendant Clear Channel Broadcasting, Inc. ("Clear Channel"), in the above-captioned lawsuit.

3. Attached hereto as Exhibit 1 is a true and correct copy of Plaintiff's Original Petition filed by Clear Channel in Bexar County, Texas, captioned *Clear Channel Broadcasting, Inc., et al. v. Frequency, LLC, et al.*, Case No. 2007-CI-12493.

4. Attached hereto as Exhibit 2 is a true and correct copy of the November 30, 2006 Confidentiality Agreement that is described in art. 5.1 of the April 30, 2007 Asset Purchase Agreement by and between Clear Channel and Plaintiff Frequency, LLC.

Executed in San Antonio, Texas on this 2nd day of October 2007.


MELANIE G. COWART